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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RICHARD STEVEN LOUGH,

Defendant, Cross-complainant and  
Appellant,

v.

RODGER LOUGH,

Defendant, Cross-defendant and  
Respondent.

B229119

(Los Angeles County  
Super. Ct. No. NC050332)

ORDER MODIFYING OPINION AND  
DENYING PETITION FOR  
REHEARING

[CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on June 28, 2012 be modified as follows:

1. On page 18, at the conclusion of subsection I., the following new subsection is inserted:

C. *The Judgment Incorrectly Refers To “Net Proceeds” Rather Than “Net Profits*

Richard argues that the trial court erred in awarding Rodger a success fee based on “net proceeds” rather than on “net profits.” He notes that Rodger’s expert, Hugh Saddington, never stated “that the value of Rodger’s work should be based on a percentage of net sales price or total

stipulated value,” but instead only opined that the value should be determined as a percentage of net profits. Richard further argues that compensating Rodger based on a percentage of net proceeds would go beyond compensating Rodger for the net value created by Rodger’s efforts. Richard argues that determining the net value Richard and Rodger receive from a sale of the Malibu Acres requires the deduction of the costs of acquisition, actual improvement costs, and actual carrying costs.

Richard extends his argument to the Flint and Pacific View properties. The judgment awarded Rodger a 20 percent fee on the \$800,000 stipulated value of the Pacific View property. The judgment awarded Rodger a 10 percent fee on the \$500,000 stipulated value for the 321 Flint and 323 Flint lots. Richard’s argument, essentially, is that awarding a success fee on the stipulated value fails to include the costs associated with the properties. Accordingly, it includes value that Rodger did not add through his contributions. We agree with respect to the Malibu Acreage because the value of that property, unlike the Pacific View properties and Flint Lots, has yet to be determined.

“Net proceeds” are defined as “The amount received in a transaction minus the costs of the transaction (such as expenses and commissions).” (Black’s Law Dict. (8th ed. 2004) p. 1242, col. 1.) “Net profit,” on the other hand, is defined as “Total sales revenue less the cost of the goods sold and all additional expenses.” (Black’s Law Dict. (8th ed. 2004) p. 1247, col. 1.) In other words, net profits will necessarily be less than net proceeds in any given transaction because it includes the cost associated with goods sold.

The record supports a finding that the work Rodger did on the Malibu Acres, Pacific View, and Flint lots was the type of entitlement work justifying a developer’s receipt of a “success fee” portion of the net profits

realized from the development. The referee relied on the analysis of Rodger's experts, Hugh Saddington and John Andreotti, as well as that of Richard's expert, John Tollman, in reaching his recommendation on success fees. However, as Richard notes, Saddington only stated that the value of Rodger's work should be based on success fees determined as a percentage of net profits. In calculating Rodger's success fee on the Malibu Acres, Saddington deducted costs in calculating the "20 percent profit share." Likewise, with the Pacific View property, Saddington's analysis "allocated 20 percent profit share" to Rodger. Saddington did the same analysis with the Flint lots, allotting Rodger a "20 percent profit share" in these lots. Saddington's use of profits is reflected in his opinion summaries, which deduct purchase price and other costs in calculating Rodger's success fee.

None of the other experts used net proceeds in calculating Rodger's success fee either. Andreotti estimated that in such a project as the Malibu Acres, he "would be looking for a number 30 percent plus of the profit" for his percentage participation. John Tolman agreed with Andreotti that a success fee "of 30 percent of the profit upon sale" was not atypical. Tolman additionally testified that Saddington's accounting failed to account for costs that should have been deducted from the cost of sale "in order to determine what the real profit was." None of the experts based success fees on net proceeds. The purpose of using a success fee was to award Rodger's "sweat" contributions. A net proceeds valuation would include the cost of acquiring, improving, and holding the properties, meaning that Rodger would be compensated for value that his "sweat" contributions did not create. The record makes clear that the trial court's use of the term "net proceeds" in the judgment to the Malibu Acreage was an inadvertence.

However, the error impacts only the Malibu Acreage. The judgment provides that with respect to the Pacific View property, "[p]ursuant to the

parties' agreements as placed on the record on May 5, 2008 and the findings and recommendations of the Referee as heretofore adopted by the Court, [Rodger] is entitled to receive monetary credit for his non-monetary contributions to the Pacific View House equal to 20% of \$800,000 (the parties' stipulated value for the Pacific View House), and is entitled to credit as against [Richard] for one-half that amount, or \$80,000 . . . .” Similarly, the judgment provides with respect to the 321 and 323 Flint Lots that “[p]ursuant to the parties' agreements as placed on the record on May 5, 2008 and the findings and recommendations of the Referee as heretofore adopted by the Court, [Rodger] is entitled to receive monetary credit for his non-monetary contributions to the 321 Flint and 323 Flint [lots] equal to 10% of \$500,000 (the parties' stipulated value for the 321 Flint and 323 Flint [lots]), and is entitled to credit as against [Richard] for one-half that amount or \$25,000 . . . .” Although the parties agreed to split the properties and sell them, pursuant to the judgment, the parties were not ordered to sell the properties in order to realize “net profits.” As a result, because there is no sale to take place with respect to either of these properties in order to divide “net profits,” the referee used the stipulated values of the properties as a basis for Rodger's success fee.

Therefore, the trial court must modify the judgment to use the term “net profits” instead of “net proceeds” in delineating Rodger's success fee on the Malibu Acreage.

2. On page 26, the third full paragraph beginning “Pursuant to section 685.010” and on page 27, the first two full paragraphs are deleted and the following is inserted in its place:

Code of Civil Procedure section 685.010, subdivision (a) provides that “[i]nterest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied.” (Code Civ. Proc.,

§ 685.010, subd. (a).) Thus, in order for postjudgment interest to run on any judgment, that judgment must be a money judgment. Code of Civil Procedure section 685.020, subdivision (a) provides that “interest commences to accrue on a money judgment on the date of entry of the judgment.” (Code Civ. Proc., § 685.020, subd. (a).) The trial court’s judgment was not a money judgment because it was too uncertain to be enforced. Accordingly, section 685.020, subdivision (a) does not apply until the judgment can be enforced—i.e., after the sale of the Malibu Acres. Accordingly, the opinion should be modified to affirm the trial court’s determination that postjudgment interest should run from the date of the close of escrow on the Malibu Acres.

Code of Civil Procedure section 680.270 defines a “money judgment” as “that part of a judgment that requires the payment of money.” (Code Civ. Proc., § 680.270.) The amount of any judgment should be “computed and stated in dollars and cents, rejecting fractions.” (Code Civ. Proc., § 577.5.) Furthermore, “a judgment for money must be stated with certainty and should specify the amount.” (*Kittle v. Lang* (1951) 107 Cal.App.2d 604, 612; *In re Estate of Kampen* (2011) 201 Cal.App.4th 971, 986.) The question is whether the trial court’s judgment on the Malibu Acres may be considered a money judgment. If it is not a money judgment, then postjudgment interest necessarily cannot accrue on the judgment, even if judgment has been entered.

In *Kittle*, plaintiff and defendant formed a partnership whereby plaintiff would devote his “full time to the interest of the business” in exchange for a one-half interest in the business and a \$50 a week salary. (*Kittle v. Lang, supra*, 107 Cal.App.2d at p. 607.) Defendant refused to comply with the agreement and the partnership dissolved. (*Ibid.*) As part of its findings, the trial court “found that defendant had collected ‘certain

sums of money on behalf of plaintiff, as more particularly appears from defendant's testimony herein,' and that plaintiff is entitled to any and of said sums of money so collected by defendant.” (*Id.* at p. 608.) The court held that this “portion of the judgment [was] too indefinite and uncertain to be enforced.” (*Id.* at p. 613.) In reaching this holding, the court declared that the rule for “a judgment of money” is that the judgment “must be stated with certainty and should specify the amount.” (*Id.* at p. 612.)

Rodger further cites *Khazan v. Braynin* (2012) 206 Cal.App.4th 796 for the proposition that interest should not start to run until the dollar amount of the payment obligation can be calculated and determined. The issue in *Khazan* was whether postjudgment interest on attorney fees included in the judgment should run on the date of the original judgment, which was reversed on appeal, or on the date of the award on remand. (*Id.* at p. 800.) The court affirmed the trial court's determination that interest should run from the date of the award on remand. (*Ibid.*) In reaching its decision, the court noted that “The California rate” of legal interest “bears no relation to the amount any investor may reasonably expect to receive from investments during the period between entry of judgment and a ruling on an application for attorney fees.” (*Id.* at p. 812.) The court then applied the reasoning of Civil Code section 3287, which applies to prejudgment interest, to postjudgment interest. (*Id.* at p. 813.) That reasoning, the court explained, was the “equitable principal in California that ‘a person who does not know what sum is owed cannot be in default for failure to pay.’” (*Ibid.*)

The judgment here fails in these two respects: it is not stated in “dollars and cents, rejecting fractions,” and it does not specify an amount. In other words, it cannot qualify as a money judgment subject to postjudgment interest until it meets the certainty requirement in Code of

Civil Procedure section 577.5 and *Kittle v. Lang*, *supra*, 107 Cal.App.2d 604. This is because Rodger's obligation to pay Richard can only be determined upon the sale of the Malibu Acres whereby Rodger's and Richard's total credits can be computed and compared. Rodger's total credits include "20 percent of the net proceeds of the sale of the Malibu Acres," meaning that Rodger's total credits cannot be computed with certainty until the Malibu Acres are sold.

Here, the judgment contains a formula which could theoretically be applied to determine the total money judgment. That formula compares Richard's and Rodger's total credits after the sale of the Malibu Acres. If there is no discrepancy between the two, neither owes the other anything. However, if Richard's total credits are greater than Rodger's, then Rodger owes the discrepancy to Richard. The problem is that the sales price of the Malibu Acres cannot be easily ascertained even though the judgment allows only a narrow band of sales prices because the Malibu Acres have not yet been sold. In other words, because the sales price has yet to be determined, the judgment thereby cannot be definitely ascertainable. (See *In re Marriage of Sandy* (1980) 113 Cal.App.3d 724, 728, fn. 3.) Accordingly, as the judgment is not definitely ascertainable, it is not a money judgment and postjudgment interest cannot accrue until it becomes definitely ascertainable. In other words, Rodger should not be forced to pay interest on a judgment amount that he does not know and cannot readily ascertain.

Moreover, even if the judgment were considered a money judgment, postjudgment interest only runs on the portion of a money judgment that is "unsatisfied." (Code Civ. Proc., § 685.010.) Until the Malibu Acres are sold and Rodger's and Richard's total credits calculated, postjudgment interest cannot accrue, as no portion of the money judgment is "unsatisfied."

Finally, we disagree with Rodger that the court erred in ordering that postjudgment interest be deducted from the proceeds of sale of the Malibu Acreage. Nothing in the statutory scheme prohibits the trial court from specifying the source of interest, and thus the trial court was within its equitable powers given the nature of the proceedings before it to declare that any interest accrued would be payable from the proceeds of the Malibu Acreage.

3. On page 29, the first full paragraph beginning “The judgment of the superior court” is deleted and the following paragraph is inserted in its place:

The judgment is affirmed as modified to provide that Rodger Lough’s success fee commission is to be applied to the “net profits” obtained on the sale of the Malibu Acreage. Respondent is to recover costs on appeal.

This modification constitutes a change in the judgment.

The petition for rehearing is denied.

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ROTHSCHILD, Acting P. J.

CHANEY, J.

JOHNSON, J.